should be executed on behalf of the judgment debtor and s 217 specifically provides that the transfer under the Act shall be effected by instrument in Form 14A.

He submitted that this requirement was not followed. The senior assistant registrar's certificate of sale embodying the transfer instrument of the land on behalf of the respondent does not follow any specific form provided by the NLC or Rules of the High Court 1980 and it cannot therefore be said that an appropriate instrument sufficient to effect the transfer has been executed.

It is fairly obvious that the present facts are distinguishable from *Doshi* v *Yeoh Tiong Lay*.[1] There, appropriate instrument of transfer in Form 14A was executed by the parties but it was alleged that the attestation clause in the Form was false to the knowledge of the attestor and it was held that the instrument was sufficient to confer registrable interest over the land.

In these arguments, there is, in our view, serious questions to be tried whether the auction sale of the land is absolute having regard to the Rules of the High Court 1980 and whether registration was effected by sufficient instrument to vest indefeasible title on the appellant under the NLC. These questions have to be decided at trial of this suit.

The learned Judicial Commissioner, however, dealt with the facts of the case and not the legal consequence of s 337 NLC and O 47 of the Rules of the High Court 1980 although they were argued before him. He found that the respondent as caveator has discharged the onus establishing that the caveat should remain pending the disposal of the issues raised. He has correctly applied the principle in *Eng Mee Yong & Ors* v *V Letchumanan*[2] and satisfied that the balance of convenience shows that it is better to maintain status quo until trial of the action scheduled in his court.

In our view, on the facts before him, the learned Judicial Commissioner has exercised his discretion correctly and has not acted contrary to recognized principles of law. In this view, this appeal is dismissed with costs here and below. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *C Subbayah & Associates; Leng & Co.*

Reported by *Prof Ahmad Ibrahim*

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-251-1989
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
29 OCTOBER 1990

Companies and Corporations — Winding-up — Supporting creditor — Default judgment — Locus standi

Civil Procedure — Default judgment — Good and enforceable judgment until set aside

The appellant company were the contractors to the respondent company for a development project of property owned by the respondent company. The balance of payment for work on the development project was due to the appellant company and they obtained a default judgment against the respondent company. In the meantime a petition for winding-up of the respondent company had been presented by the Morgan Guarantee Trust Co. The appellant company supported the petition as supporting creditor. The respondent company filed a notice to strike out the appellant company as a supporting creditor on the grounds that it had no locus standi to support the petition (see [1989] 3 MLJ 172). The learned trial judge gave judgment for the respondent company as he held that the default judgment was null and void and should be set aside. The appellant company appealed.

Held, allowing the appeal:
The default judgment in this case until set aside is a good and enforceable judgment and the appellant company was perfectly entitled to rely on the default judgment as a basis for its right to be a supporting creditor and should be recognized in the petition as a supporting creditor.

[Bahasa Malaysia summary

Perayu sebuah syarikat adalah pemborang kepada responden yang juga sebuah syarikat bagi projek pembangunan tanah yang dimiliki oleh responden. Baki pembayaran lagi pekerjaan yang dijalankan bagi projek itu telah terhutang kepada perayu dan ia telah mendapat penghakiman ingkar terhadap responden. Dalam pada itu satu petisyen penggulungan syarikat responden telah dikemukakan oleh Morgan Guarantee Trust Co, sebuah syarikat di Amerika. Perayu telah menyokong petisyen sebagai pemiutang penyokong. Responden telah mengemukakan notis untuk membatalkan tindakan perayu sebagai pemiutang penyokong atas alasan ia tidak mempunyai locus standi menyokong petisyen itu (sila lihat [1989] 3 MLJ 172). Hakim yang arif telah membuat keputusan bagi responden oleh kerana beliau berpendapat penghakiman ingkar itu adalah terbatal dan tak sah dan hendaklah diketepikan. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:
Penghakiman ingkar di dalam kes ini sehingga ia diketepikan adalah penghakiman yang sah dan yang boleh dikuatkuasakan dan perayu berhak bergantung kepada penghakiman ingkar itu sebagai asas bagi haknya menjadi pemiutang penyokong dan ia seharusnya diiktiraf didalam petisyen itu sebagai pemiutang penyokong.]

Cases referred to
1 *Anlaby & Ors* v *Praetorius* (1888) 20 QBD 174 (refd)
2 *Syarikat Joo Seng & Anor* v *Habib Bank Ltd* [1986] 2 MLJ 129 (distd)

3 *Eu Finance Bhd* v *Lim Yoke Foo* [1982] 2 MLJ 37 (distd)
4 *Harkness* v *Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 (distd)
5 *Isaacs* v *Robertson* [1984] 3 ALL ER 140 (folld)
6 *Hadkinson* v *Hadkinson* [1952] 2 All ER 567 (refd)

Legislation referred to
Rules of the High Court 1980 O 3 r 2(5), O 19 r 7(1)

Appeal from: Companies Winding-Up No D1-42-577-1987 (High Court, Kuala Lumpur)

PS Gill for the appellant.
MS Murthi for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellant company, Pembinaan KSY Sdn Bhd ('KSY'), were the contractors to Lian Seng Properties Sdn Bhd ('the company') engaged for the development project of a property (now called KL Plaza) owned by the company.

The company had borrowed heavily from various financial institutions for the development project and by June 1986 the company owed KSY $10,529,000 on account of unpaid architect's certificates. In fact work on the development project came to a standstill on account of the company's failure to pay and the banks refused to lend any more money to the company. After some negotiations which must have aborted, KSY finally sued the company for the amount of $10,529,000 in January 1987.

After various extensions of time granted by the court for the company to file the defence KSY finally entered judgment in default on 31 March 1987 for the same sum and the company was duly informed of this fact.

On 22 April 1987 KSY and the company signed a lump sum agreement after negotiations with the various financial institutions where the company agreed that upon completion of the development project they would pay KSY a lump sum of $26,050,000. KSY completed the balance of the work on the development project and a certificate of practical completion was issued on 1 November 1987 but no payment was made.

On 10 December 1987 a winding-up petition was filed by Morgan Guarantee Trust Co of New York against the company which was the subject of another appeal (Supreme Court Civil Appeal No 02-454-89). KSY gave notice of intention to support the Morgan Guarantee Trust petition on 15 April 1988. In the appeal by Morgan Guarantee Trust we held that Morgan Guarantee Trust Co of New York was competent to file the petition on the date of the petition (see [1991] 1 MLJ 31).

The winding-up petition was postponed a number of times and on 6 March 1989 the company filed a notice of motion to strike out KSY as a supporting creditor on the grounds that it had no locus standi to support the petition. The learned judge granted the order in terms of the motion (see [1989] 3 MLJ 172). Hence this appeal.

In his written judgment the learned judge found that KSY founded its rights to be a supporting creditor on two judgments, namely, the default judgment entered on 31 March 1987 for $10,529,000 and on O 14 judgment obtained on 17 November 1988 for $12,902,000. As the O 14 judgment was granted subsequent to the date the company gave notice of intention to support the petition, that is 15 April 1988, we need only concern ourselves in this appeal with the default judgment.

The question is whether the default judgment is a sufficient basis for KSY's application to support the petition.

The learned judge devoted a substantial part of his written judgment on the reasons why he found the default judgment to be 'null and void' and should therefore be set aside. He concluded at p 17 of his judgment:

> Accordingly the said default judgment entered on 31 March 1987 was irregularly entered independent of the RHC and should be set aside ex debito justitiae.

The reasons why he came to this conclusion was that he held that the company had seven days from 23 March 1987 to file the defence, that is, it had up to 2 April to file the defence. Since O 3 r 2(5) of the Rules of the High Court 1980 excludes Saturday and Sunday and purporting to apply *Anlaby & Ors* v *Praetorius*[1] and *Syarikat Joo Seng & Anor* v *Habib Bank Ltd*[2] the learned judge ruled that the default judgment relied on by KSY was a nullity. Since the default judgment was a nullity the company had the option to ignore it or go to court to set aside relying on *Eu Finance Bhd* v *Lim Yoke Foo.*[3]

With respect, the conclusion of the learned judge was in our view misconceived.

Syarikat Joo Seng & Anor[2] was an appeal where judgment in default of defence was entered without obtaining leave from the court or judge. There the appellant had applied to set aside the default judgment and that was refused by the High Court judge and the appeal was against the refusal. In that case the respondent should have complied with O 19 r 7(1) of the Rules of the High Court 1980 by applying to the court or judge for leave to enter judgment against the appellants.

Eu Finance Bhd[3] concerned an appeal on the administrative act of the Collector of Land Revenue and the issue before the court concerned jurisdiction. In

Harkness v *Bell's Asbestos and Engineering Ltd*[4] Lord Diplock was referring to an order which is a nullity, not an order which has been irregularly obtained.

The default judgment in this case until set aside is a good and enforceable judgment. The correct law on this issue is as stated in *Isaacs* v *Robertson*[5] where the headnote reads:

> Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside.

In the speech of Lord Diplock reference was made to the passage in the judgment of Romer LJ in *Hadkinson* v *Hadkinson*:[6]

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.

In this case the application to set aside the default judgment although made on 4 April 1987 was only served on KSY on 19 May 1990. It was exhibited for the first time in the company's application in the proceeding.

It was clear to us that KSY was perfectly entitled to rely on the default judgment as basis for its rights to be a supporting creditor and KSY should be recognized in the petition as a supporting creditor.

The appeal was accordingly allowed with costs here and below.

Appeal allowed.

Solicitors: *Gill & Tang*; *Murthi & Partners*.

Reported by *Prof Ahmad Ibrahim*

Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-95-84
WAN ADNAN J
27 OCTOBER 1990

Insurance — Marine insurance — 'All Risks' cargo policy — Construction of policy — Cargo carried on deck due to carriers' default — Whether loss covered under 'All Risks'

Civil Law Act — English Marine Insurance Act 1906 — Applicability of

The appellants were the owners and shippers of a cargo of ten cases of men's sports shoes with rubber soles lately laden on board the vessel 'Masindo' under bill of lading no PS-5 dated 24 October 1978 for carriage to and delivery at Sibu, Sarawak. The goods were to be carried below deck. The appellants took up insurance policy no AG1/78 MA/1677-M with the respondents insuring the goods against 'All Risks'. The carriers carried the goods on deck in breach of the contract of carriage thereby causing damage to the goods. The appellants had obtained judgment in default against the carriers. The appellants' claim against the respondents for indemnity for their loss under the 'All Risks' policy was dismissed in the lower court. The issue on appeal was whether the 'All Risks' cover embraced the loss due to the carriers' default in carrying the goods on deck.

Held, allowing the appeal:

(1) By virtue of s 5 of the Civil Law Act 1956, the law applicable is the English Marine Insurance Act 1906.

(2) Damage, if it is to be covered by 'All Risks' policies, must be due to some fortuitous circumstance or casualty.

(3) The damage to the goods was fortuitous and not due to any wilful misconduct on the appellants' part. The damage was caused in circumstances beyond the appellants' control and solely as a result of the said goods being improperly carried by the carriers.

(4) Rule 17 of the 'Rules for Construction of Policy' in the schedule to the English Marine Insurance Act 1906 does not arise as the goods were shipped as cargo to be carried below deck. Insuring them specifically as deck cargo did not arise.

(5) The 'All Risks' cover covers the risk of default by the carriers.

[Bahasa Malaysia Summary

Perayu merupakan tuanpunya dan pengirim melalui kapal untuk satu kargo yang mengandungi sepuluh kotak kasut sukan dengan tapak getah. Kargo ini telah dimuatkan ke dalam kapal 'Masindo' di bawah senarai barang-barang dagangan kapal yang bernombor PS-5 yang bertarikh 24 Oktober 1978 untuk muatan dan penghantaran ke Sibu, Sarawak. Barangan itu sepatutnya dimuatkan di dek bawah. Perayu mengambil polisi insuran bernombor AG1/78 MA/1677-M dengan responden untuk menginsuranskan barangan itu terhadap 'Semua Risiko'. Pengirim melalui kapal itu memuatkan barangan di atas dek. Ini merupakan satu pecah kontrak muatan dan barangan itu telah rosak. Perayu telah mendapatkan penghakiman terhadap pengirim melalui kapal itu. Tuntutan perayu terhadap responden untuk tanggung rugi untuk kerugian yang dialami di bawah polisi 'Semua Risiko' telah di tolak di mahka-